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No. 09-1097

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTONIO PECK, a minor by and through his parents and next friends, JO ANNE PECK and KENLEY LESTER PECK,

Petitioner,

v.

BALDWINSVILLE CENTRAL SCHOOL DISTRICT, CATHERINE MCNAMARA ELEMENTARY SCHOOL, MARY R. SCHILZ, in her official capacity as Principal of Catherine McNamara Elementary School, JEANNE DANGLE, in her official capacity as Superintendent for Baldwinsville Central School District,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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The significant conflicts between this Court's and other circuits' precedents and the Second Circuit's summary dismissal of Antonio's claims, unless addressed by this Court, could have far-reaching consequences, including erosion of this Court's nearly 40 years of carefully balanced protection of free speech rights on public speech campuses.

REASONS FOR GRANTING THE PETITION

Respondents boldly – and wrongly – proclaim that the Second Circuit's summary dismissal of Petitioner's First Amendment claims "does not conflict with a decision of this Court or any court of appeals," so that there is no "compelling reason" for this Court to grant review. (Brief in Opposition, p. 6). Respondents can make that proclamation only by ignoring and misinterpreting precedent and selectively re-interpreting the facts of this case to support their conclusion. Although acknowledging that school officials followed customary procedures when they censored religious content in Petitioner's artwork (Brief in Opposition, p. 4), Respondents assert that Petitioner's First Amendment claims were properly dismissed because Petitioner failed to prove that Respondents acted according to custom or policy. (Brief in Opposition, p. 6). To bolster their position, Respondents cite to irrelevant facts outside the record before this Court, rely upon those facts to attempt to distinguish relevant precedent and then claim that there is no conflict worthy of this Court's review.

Respondents' attempt at prestidigitation fails to erase the significant conflicts between this Court's and other circuits' precedents and the Second Circuit's summary dismissal of Antonio's claims. *See e.g., Heldman v. Sobol*, 962 F.2d 148, 157 (2d Cir. 1992) (A student who was not presently enrolled in school but still qualified for services still had standing.); *Caroline T. v. Hudson School Dist.*, 915 F.2d 752, 757 (1st Cir. 1990)(same); *McCormick v. School District of Mamaroneck*, 370 F.3d 275, 285 (2d Cir. 2004) (juniors in high school could still benefit from the court's decision regarding the sports program). The Second Circuit's decision sanctions deprivation of students' First Amendment rights for "undifferentiated fear or apprehension of disturbance'" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," which this Court has explicitly rejected, even while permitting school officials to restrict certain speech activities. *Morse v. Frederick*, 551 U.S. 393 (2007).

Unless addressed by this Court, those conflicts could have far-reaching consequences, including erosion of this Court's nearly 40 years of carefully balanced protection of free speech rights within an educational setting and circumvention of this Court's precedents to chill student speech.

I. RESPONDENTS' FAILED ATTEMPT TO DISTINGUISH *HONIG* ACTUALLY EMPHASIZES THE CONFLICT BETWEEN *HONIG* AND THE SECOND CIRCUIT'S DECISION.

Respondents attempt to defend the Second Circuit's ruling that Antonio lacked standing by pointing to dissimilarities between this case and *Honig v. Doe*, 484 U.S. 305, 318-321 (1988), and claiming that those dissimilarities render *Honig* inapposite. The attempt backfires, however, because the factual dissimilarities between *Honig* and this case actually elucidate the conflict between the Second Circuit's ruling and this Court's holding that a party retains standing if there is a reasonable expectation that he will again suffer the kind of injury that precipitated the lawsuit. *Id.* Relying upon their ubiquitous "absence of policy" argument, Respondents claim that the circumstances that gave a plaintiff standing to seek injunctive relief in *Honig* "have no parallel in this case," because the actions challenged in *Honig* were "taken pursuant to an official state policy." (Brief in Opposition, p. 9).

Respondents are correct that the facts in *Honig* do not parallel the facts in this case, but the dissimilarities actually strengthen Petitioner's position. In *Honig*, the plaintiff was no longer enrolled in school but remained eligible to enroll under state law. *Honig*, 484 U.S. at 320. This Court held that the plaintiff retained standing despite not being a student and having moved to a different

district because, until he reached age 21 or graduated from high school, he faced the possibility that he would enroll in public school and be subject to the same impermissible conduct that precipitated the lawsuit. *Id.* In this case, unlike the plaintiff in *Honig*, Petitioner is still enrolled in the same district that engaged in the challenged conduct. Consequently, it is even more likely that Petitioner will be subject to the same impermissible conduct than was the non-student plaintiff in *Honig*. Therefore, Petitioner has an even stronger claim for continued standing than did the plaintiff in *Honig*, and the Second Circuit's contrary conclusion conflicts with this Court's precedent.

The strength of Petitioner's claim vis-à-vis the *Honig* plaintiff's claim is also apparent in the fact that Respondents censored religious content in Petitioner's artwork not because Respondents were concerned that young impressionable *students* would misunderstand, but because they were concerned that *parents and other adults* viewing the artwork would believe that Respondents were teaching religion. The concern about adults' reactions to students' work persists throughout a student's academic career. While it might not be reasonably likely that Respondents would again censor Petitioner's work to shield his elementary school peers from religious content, it is reasonably likely that Respondents would censor religious content in Petitioner's work to shield adult observers from viewing religious content so long as Petitioner remains enrolled in the district. In that

respect, the likelihood of recurrence is even greater for Petitioner than it was for the plaintiff in *Honig*.

Respondents also fault Petitioner for relying upon this Court's standing analysis employed in *Honig* which, like this case, addressed student rights, instead of the analysis in *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983), which involved the treatment of arrestees. (Brief in Opposition, p. 8). Apparently attempting to diminish the important distinction between the cases, Respondents imply that Petitioner created the differential analysis. (Brief in Opposition, p. 8 ("According to Petitioner")). In fact, it was this Court that pointed out that the question of reasonable expectation of recurrence is interpreted differently when the plaintiff is exercising a legal right than when he is engaging in questionable legal behavior. *Honig* 484 U.S. at 320. "[F]or purposes of assessing the likelihood that state authorities will reinflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury," e.g., being stopped and resisting arrest, as in *Lyons*. *Id.* However, when the challenged act does not require that the claimant engage in misconduct, this Court has been more willing to assume that the plaintiff will again face a deprivation of rights at the hand of the defendant. *Id.* Since Petitioner was engaging in legally protected behavior when Respondents censored his work, the analysis in *Honig*, not the analysis in

Lyons, should have been used to evaluate standing. The Second Circuit's reliance upon *Lyons* and similar Second Circuit criminal procedure cases to deny Petitioner standing conflicts with *Honig* and should be reviewed by this Court. To allow the Second Circuit opinion to stand is to invite disaster for other circuits and further erosion of fundamental First Amendment rights.

II. RESPONDENTS CANNOT ERASE THE CONFLICT BETWEEN THE SECOND CIRCUIT'S REDEFINITION OF THE BURDEN OF PROOF AND THIS COURT'S PRECEDENTS.

Respondents attempt to divert this Court's attention away from the Second Circuit's fundamental redefinition of the burden of proof in free speech challenges by reiterating their claim that Petitioner did not present evidence of a policy or custom. Respondents dismiss Petitioner's analysis of the conflict between the Second Circuit's ruling and this Court's student speech cases as "falling short" because all of the student speech cases involved school policies and, according to Respondents, this case does not. (Brief in Opposition, p. 10). Respondents' cavalier dismissal of Petitioner's claims is itself flawed in that it ignores Respondents' admission that officials censored Petitioner's work in accordance with school policy and disregards the nature and consequences of the Second Circuit's holding, which virtually overrules *Tinker v. Des Moines Indep.*

Comm. School Dist., 393 U.S. 503 (1969); *Elrod v. Burns*, 427 U.S. 347 (1976); *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864-865 (1982); *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986), *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) and *Morse*.

Respondents do not even attempt to defend the Second Circuit's newly minted standard for First Amendment challenges – that a victim of discrimination has to prove that the defendant regularly violates First Amendment rights before he can proceed with his claim. Instead, Respondents attempt to convince this Court that the problem lies with Petitioner's alleged failure to produce evidence of a "custom or policy." Respondents emphasize that in each of this Court's school speech cases the district restricted speech pursuant to an express school policy, established custom or both, and argue that no such policy or custom is present in this case. However, Respondents also acknowledge that school officials censored Petitioner's work after agreeing that concerns about the artwork should "be handled in the same way" such concerns had been handled in the past – *i.e.* according to established custom. (Brief in Opposition, p. 4). Therefore, as was true in *Tinker*, *Bethel*, *Hazelwood* and *Morse*, Respondents here followed established policy when they censored religious content in Petitioner's artwork.

Respondents' detour along the "absence of policy" path permitted them to claim that there is

no conflict between the Second Circuit's ruling and this Court's First Amendment precedents, but did nothing to actually erase the conflict that threatens to undermine more than 40 years of free speech jurisprudence. The Second Circuit has determined that a viewpoint discrimination claim cannot proceed unless the aggrieved student can prove that a school official "regularly violates students' free speech rights." (App., p. 6a). That standard contradicts this Court's precedents which establish that school officials, not students, bear the burden of proof when free speech rights are affected. This Court has emphasized that "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Pico*, 457 U.S. at 864-865. Contrary to the Second Circuit's conclusion, this Court has established that school officials, not the aggrieved students, must bear the burden of justifying restrictions on student speech. *Tinker*, 393 U.S. at 509. *Bethel, Kuhlmeier* and *Morse* granted school officials some control over student speech in limited situations, but retained the underlying principle that school officials have the burden of proving that actions which affect student free speech rights are justified by compelling state interests. *Bethel*, 478 U.S. at 685; *See also, Elrod*, 427 U.S. at 362 (when governmental conduct interferes with First Amendment expression, the *burden is on the government* to prove that its action advances an interest that is paramount and of vital importance) (emphasis added).

Respondents are gravely mistaken when they claim that "the Second Circuit's decision in this case does not conflict in any way with this Court's decisions in *Tinker*, *Kuhlmeier*, *Bethel* or *Morse*." (Brief in Opposition, p. 11). The Second Circuit has turned student free speech precedents on their head and placed an impossible burden upon those who have suffered censorship at the hands of school officials. Without this Court's review, the free speech principles announced in *Tinker* and fine-tuned in *Kuhlmeier*, *Bethel* and *Morse* will become little more than meaningless platitudes. This Court should grant certiorari to resolve the conflict and solidify the foundational First Amendment principles upon which student free speech rights are grounded.

III. THE SECOND CIRCUIT CONTRAVENED THIS COURT'S PRECEDENTS PROTECTING THE FULL RANGE OF REMEDIES FOR FIRST AMENDMENT VIOLATIONS.

As recently as January 21, 2010, this Court re-affirmed that zealously protecting First Amendment freedoms means protecting the full range of remedies to redress deprivations of those fundamental rights. *Citizens United v. Federal Election Commission*, __ U.S. __, 130 S.Ct. 876, 893 (2010). Once a federal claim is properly presented, a party can make any argument in support of that claim; it is not limited to arguments raised below. *Id.* (citing *Lebron v. Nat'l R.R. Passenger Corp.*, 513

U.S. 374, 379 (1995)). Similarly, Federal Rule of Civil Procedure 54(c) provides that final judgments should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings. Nevertheless, Respondents argue that *Citizens United* and Rule 54(c) are inapposite because they do not address Federal Rule of Appellate Procedure 28's requirement that an appellate brief state "the precise relief sought." (Brief in Opposition, p. 12).

Respondents' arguments contradict prevailing appellate authorities which provide that courts have the duty to grant whatever relief they deem appropriate regardless of the procedural formalities in the pleadings. *United States v. Marin*, 651 F.2d 24, 31 (1st Cir. 1981); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir. 1971); *Columbia Nastri & Carta Carbone, S/p/A v. Columbia Ribbon & Carbon Manufacturing Co., Inc.*, 367 F.2d 308, 312 (2d Cir. 1966); *Tabbaa v. Chertoff*, 509 F.3d 89, 96 (2d Cir. 2007). *Tabbaa* is particularly problematic for the Second Circuit and Respondents in that the Second Circuit rejected defendants' argument that the plaintiffs abandoned their demand for expungement by not raising it in their opening brief as required under appellate Rule 28. *Tabbaa*, 509 F.3d at 96. The Second Circuit panel in *Tabbaa* found that plaintiffs met the requirements of Rule 28 when they requested that this Court "reverse the District Court ruling granting summary judgment to the defendants." *Id.* "This request incorporates the demand for expungement that plaintiffs made below because a

reversal of the grant of summary judgment would necessarily revive that demand. Nothing more is required." *Id.* Neither the Second Circuit nor Respondents have or can explain why the same is not true for Petitioner in this case.

Instead, both the Second Circuit and Respondents rely upon *Norton v. Wal-Mart Corp.*, 145 F.3d 114, 117 (2d Cir. 1998), which held that an appellee cannot raise a procedural error as a defense to appellants' argument if the appellee merely made a passing reference to appellant's procedural error in his brief. Since *Tabbaa* dealt with remedies and *Norton* with defenses, there cannot be any justification for either the Second Circuit's or Respondents' reliance upon *Norton* to support a claim for waiver of remedies.

Respondents' citation to *Adler v. Duval County School Board*, 112 F.3d 1475, 1480 (11th Cir. 1997) does nothing to resolve the conflict between the Second Circuit's holding and prevailing authority. In *Adler*, the Eleventh Circuit found that the plaintiffs had failed to preserve their appeal of the lower court's summary judgment motion on damages when they appealed summary judgment on the issue of constitutionality of a school speech policy. *Id. Adler* does not address the question at issue here–and answered in *Tabbaa*, *Marin*, *Robinson*, and *Columbia*—whether a party satisfies Rule 28 when they ask for a reversal of a trial court ruling that incorporates remedies appropriate to the underlying claim.

As is true with Respondents' attempt to distinguish *Honig*, their attempt to defend the Second Circuit's finding that Petitioner waived a claim for damages only succeeded in illuminating the conflict between the Second Circuit's decision, its own prior decisions, decisions from other circuits, and precedents from this Court.

CONCLUSION

Respondents urge this Court to deny the Petition for a Writ of Certiorari with arguments that underscore the substantial conflict between the Second Circuit's ruling and prevailing precedent. That conflict threatens to undermine 40 years of student free speech precedent and reflects a growing hostility regarding students' basic First Amendment rights on public school campuses. (*See* Brief Of Amici Curiae Liberty Counsel, Child Evangelism Fellowship And Lamb's Chapel In Support Of Petitioner, at 12-22, 28-34, *Christian Legal Society v. Martinez*, Case No. 08-1371, and cases cited therein).

Petitioner respectfully requests that this Court stem the growing wave of hostility by granting his Petition for a Writ of Certiorari.

May 14, 2010.

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